93-132

CASE NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

GLORIA JEAN R. DVORAK
Petitioner

v.

BARBARA H. FRITZ
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED FOR REVIEW

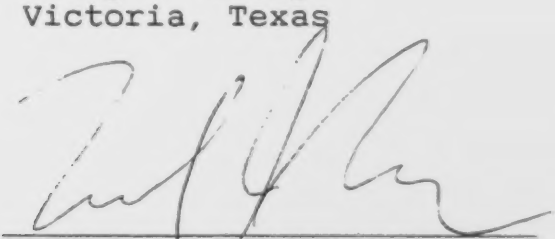
Whether the lower court erred in determining that attorneys fees incurred by the debtor's ex-husband in post-divorce state court litigation involving their daughter, which she was then ordered to pay by the state court, are a non-dischargeable debt under Chapter 7 of the Bankruptcy Code, contrary to the plain wording and unambiguous meaning of the statute.

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

Gloria Jean R. Dvorak, Petitioner
Attorney: Michael J. Pledger
Pledger & Pledger
Houston, Texas

Barbara H. Fritz, Respondent,
Attorney: Larry D. Woody
Victoria, Texas



MICHAEL J. PLEDGER
Attorney for Petitioner

TABLE OF CONTENTS

Questions Presented For Review	p. 1
List Of All Interested Parties	p. 2
Table Of Contents/Table Of Authorities	p. 3
Official Court Opinions	p. 5
Statement Of Jurisdiction	p. 6
Statutes	p. 7
Statement Of The Case	p. 9
Argument	p. 11
Conclusion	p. 17
Appendix	p. 19

TABLE OF AUTHORITIES

CASES

Freytag v. C.I.R.	p. 14
In re Kelley	p. 15
In re Mozingo	p. 16
Rodriguez v. U.S.	p. 15

STATUTES

11 U.S.C. § 523(a)(5)(A) p. 13

OFFICIAL COURT OPINIONS

The United States Bankruptcy Court for the Southern District of Texas issued its Memorandum Opinion and Order signed December 14, 1988 determining Fritz's claim to be nondischargeable.

The United States District Court for the Southern District of Texas affirmed the decision on February 24, 1992, and the Fifth Circuit Court of Appeals also affirmed the decision on April 29, 1993.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is sought from a final order of the United States Court of Appeals, Fifth Circuit, issued April 29, 1993, and is herein filed within the required ninety (90) day period.

This court has jurisdiction pursuant to 28 U.S.C. Section 1254.

STATUTES

11 U.S.C. Section 523(a)(5)(A)

EXCEPTIONS TO DISCHARGE

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(5) to a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts

assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or....

STATEMENT OF THE CASE

This is an appeal from a final order signed by the Fifth Circuit Court of Appeals on April 29, 1993 affirming the decision of the Bankruptcy Court and District Court in determining the claim of Barbara H. Fritz to be nondischargeable.

FACTS

The Petitioner, Gloria Jean R. Dvorak, filed her Chapter 7 case subsequent to a contested state court trial, wherein the trial court terminated Petitioner's parental rights and awarded a judgment against Petitioner for attorneys fees to Barbara Fritz, attorney for Wesley Rich, father of the child, and to Roland Carlson, attorney ad litem for the child.

Debtor/Petititoner sought discharge of the attorney fees and ad litem fees in her bankruptcy case, whereupon the two

attorneys instituted adversary proceedings, asserting that the attorney fees were non-dischargeable pursuant to 11 U.S.C. § 523(a)(5) of the Bankruptcy Code. The Bankruptcy Court held that the attorney fees were non-dischargeable.

The District Court and the Fifth Circuit Court affirmed the decision on appeal.

ARGUMENT

Petitioner respectfully requests that this court grant a Writ of Certiorari in this case in order to clarify the intent and clear meaning of 11 U.S.C. § 523 (a)(5) of the Bankruptcy Code. The lower courts have issued numerous decisions effectively rewriting the plain reading of the statute, and broadening the kind of debts to be non-dischargeable, all in the name of "alimony, maintenance and support".

The Victoria County Court issued its judgment in part as follows:

> IT IS FURTHER ORDERED THAT:
> 1. Barbara H. Fritz is awarded reasonable attorney's fees for services rendered in this cause in the amount of Forty-Seven Thousand, Five Hundred and no/100 Dollars ($47,500.00)

> against GLORIA RICH DVORAK as part of the judgment rendered in this cause.

The Court placed the liability directly on Petitioner; not to the child, and not to the custodial parent. The Court did not designate the fees to be any form of maintenance or support. Not only were Petitioner's parental rights terminated where she no longer had any duty of support, but the fees of her ex-husband could not possibly be alimony, maintenance, or support as those words are commonly used, since it is not payable to the ex-spouse or child as clearly required, and furthermore, no liability for said fees was placed on those parties in the judgment. Therefore, the debt due Barbara Fritz does not fall under the exceptions to discharge of U.S.C. § 523 of the Bankruptcy Code. The Bankruptcy Code

under 11 U.S.C. § 523(a)(5)(A) states that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
>
> (5) to a spouse, former spouse or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt

> which has been assigned to the Federal Government or to a State or any political subdivision of such State);

The United States Supreme Court has ruled that when the terms of the statute are not ambiguous, judicial inquiry should be complete except in rare and exceptional circumstances. Freytag v. C.I.R., 111 S.Ct. 2631 (1991). Over the past decade, the lower courts have continued to enlarge the judicial definition of "support" for purposes of finding debts to be non-dischargeable under § 523(a)(5) to the point where the judicial gloss has now obfuscated the clear meaning of the statute. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice, and it frustrates rather than effectuates

legislative intent simplistically to assume that whatever furthers the statute's primary objective must be law. Rodriguez v. U.S., 107 S.Ct. 1391 (1987). Policy arguments are irrelevant to the interpretation of an unambiguous statute. In re Kelley, 841 F2d 908 (9th Cir.-1988).

Petitioner has a judgment rendered against her for attorney fees and the debt is due to the attorney; not to a spouse, former spouse, or child of the debtor, and not for alimony, maintenance, or support, nor even in the nature of alimony, maintenance, or support. The issue is abundantly clear by a simple reading of the statute and an application of the ordinary meaning of the word. The statute requires that the alimony, maintenance, or support be payable to a spouse, former spouse or child. It does not say anything for their benefit is non-dischargeable.

The language of 11 U.S.C. § 523(a)(5) does not provide for the former spouse's contingent liabilities should the debtor go bankrupt; in fact, it says that if the debt is assigned to another entity in any manner, then the statute doesn't apply, and the debtor is entitled to discharge of the debt. The Victoria County Court has clearly assigned the attorneys fee debt to Ms Fritz by awarding the judgment directly to her and not to Mr. Rich, Petitioner's ex-husband or to Brandi Rich, the child. Where the debt is not due to the ex-spouse or child, but directly to the attorney, it must be discharged. In re Mozingo, 153 BR 276 (Bankr. W.D. MO 1993). The lower courts have long strayed away from the clear and unambiguous meaning of 11 U.S.C. § 523(a)(5) of the Bankruptcy Code.

CONCLUSION

The federal Bankruptcy Code and its provisions must be upheld as enacted by Congress where the plain meaning of the words is unambiguous as in the instant case. To allow the lower courts to torture the clear meaning of § 523(a)(5) and to further judicially legislate by expanding the definition of non-dischargeable debts by classifying them as somehow akin to alimony, maintenance, or support, frustrates the "fresh start" approach of the Bankruptcy Code, and contradicts the clear meaning of its provisions. Petitioner, Gloria Jean R. Dvorak, prays this court to grant certiorari, reverse the decision holding the debt to Respondent, Barbara H. Fritz, non-dischargeable, and render judgment finding said debt to be discharged.

Respectfully submitted,

MICHAEL J. PLEDGER
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Houston, Texas 77098
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APPENDIX

Exhibit 1	Victoria County 135th District Court Order Signed 4/30/85
Exhibit 2	U.S. Court of Appeals, Fifth Circuit Order Signed 4/29/93

No. 26,871

IN THE INTEREST OF	)	IN THE DISTRICT
	)	
BRANDI REBECCA RICH	)	COURT OF VICTORIA
	)	COUNTY, TEXAS
	)	
A MINOR CHILD	)	135TH JUDICIAL
	)	DISTRICT

JUDGMENT

On April 9, 1985, the above-entitled and numbered cause came on to be heard. WESLEY RICH appeared in person and by attorney of record and announced ready for trial. GLORIA RICH DVORAK appeared in person and by attorney of record and announced ready for trial. Intervenors, GARY and BRENDA STEVENS appeared in person and by attorney of record and announced ready for trial. Also appearing was Roland C. Carlson, appointed by the court as attorney ad litem of the child, BRANDI REBECCA RICH.

The Court, having examined the pleadings and heard the evidence and

argument of counsel, finds that it has continuing, exclusive jurisdiction of this cause and of all the parties and that no other court has continuing, exclusive jurisdiction.

A jury having been previously demanded, a jury of twelve good and lawful jurors was duly impaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on special issues. The charge of the Court, including the special issues, and the verdict of the jury are incorporated herein for all purposes by reference.

It appearing to the Court that the verdict of the jury requires termination of the parent-child relationship between GLORIA RICH DVORAK and the child, BRANDI REBECCA RICH and the appointment of WESLEY RICH as managing conservator for the

child, BRANDI REBECCA RICH:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The parent-child relationship between GLORIA RICH DVORAK and the child, BRANDI REBECCA RICH, is terminated.

2. The prior order in this cause, which was dated May 23rd, 1980, is modified and superseded in all respects regarding the designation of managing conservator and WESLEY RICH is hereby appointed managing conservator of the child, BRANDI REBECCA RICH.

3. WESLEY RICH, as managing conservator of BRANDI REBECCA RICH, shall have all the rights, privileges, duties and powers of a parent and managing conservator of the child.

4. All prior orders for the support of BRANDI REBECCA RICH are modified and superseded by this Order and WESLEY RICH

is no longer obligated to pay support for the child to any other person.

IT IS FURTHER ORDERED that:

1. Barbara H. Fritz is awarded reasonable attorney's fees for services rendered in this cause in the amount of Forty-Seven Thousand, Five Hundred and no/100 Dollars ($47,500.00) against GLORIA RICH DVORAK as part of the judgment rendered in this cause. If GLORIA RICH DVORAK does not appeal this cause or if she prevails on appeal, it is ORDERED that this judgment be credited with Seventeen Thousand, Five Hundred and no/100 Dollars ($17,500.00) leaving recovery for attorney's fees in the sum of Thirty thousand and no/100 Dollars ($30,000.00). If GLORIA RICH DVORAK appeals this case to the Court of Appeals and does not prevail and said cause is not carried by appeal or writ of error to the Supreme Court of

Texas, it is ORDERED that this judgment be credited with the sum of Seven Thousand, Five Hundred and no/100 Dollars ($7,500.00) on attorney's fees, leaving recovery for attorney's fees in the sum of Forty Thousand and no/100 Dollars ($40,000.00).

2. Roland C. Carlson is awarded reasonable attorney's fees in the sum of Ten Thousand, Two Hundred Thirty and no/100 Dollars ($10,230.00) to be paid by WESLEY RICH taxed as costs of court for services rendered in this case. If WESLEY RICH does not appeal this cause or if he prevails on appeal, it is ORDERED that this judgment be credited with Four Thousand, Two Hundred Ninety and no/100 Dollars ($4,290.00) leaving recovery for attorney's fees in this sum of Five Thousand Nine Hundred Forty and no/100 Dollars ($5,940.00). If WESLEY RICH

appeals this case to the Court of Appeals and does not prevail and said cause is not carried by appeal or writ of error to the Supreme Court of Texas, it is ORDERED that this judgment be credited with the sum of One Thousand Six Hundred Fifty and no/100 Dollars ($1,650.00) leaving recovery for attorney's fees in the sum of Eight Thousand Five Hundred Eighty and no/100 Dollars ($8,580.00).

3. Roland C. Carlson is awarded reasonable attorney's fees in the sum of Twenty Thousand Seven Hundred Seventy and no/100 Dollars ($20,770.00) to be paid by GLORIA RICH DVORAK and taxed as part of the costs of court for services rendered in this case. If GLORIA RICH DVORAK does not appeal this cause or if she prevails on appeal, it is ORDERED that this judgment be credited with Eight Thousand Seven Hundred Ten and no/100 Dollars

($8,710.00) leaving recovery for attorney's fees in the amount of Twelve Thousand Sixty and no/100 Dollars ($12,060.00). If GLORIA RICH DVORAK appeals this case to the Court of Appeals and does not prevail and said cause is not carried by appeal or writ of error to the Supreme Court of Texas, it is ORDERED that this judgment be credited with the sum of Three Thousand Three Hundred Fifty and no/100 Dollars ($3,350.00) leaving recovery for attorney's fees in the sum of Seventeen Thousand Four Hundred Twenty and no/100 Dollars ($17,420.00).

IT IS FURTHER ORDERED that judgments rendered above for attorney's fees shall bear interest at the rate of ten percent (10%) per annum from the date the judgment is signed until paid.

During the course of the trial, counsel for GLORIA RICH DVORAK moved that

the Court strike the intervenors, Gary and Brenda Stevens, for lack of standing. The Court did and does hereby grant the motion and it is ordered that intervenors are not parties to this suit.

After the jury's verdict was received, the Court considered GLORIA RICH DVORAK'S Motion for Contempt for failure to pay child support previously filed in this cause against WESLEY RICH. Based upon the jury's answer to Special Issue No. 16 finding that WESLEY RICH owed no child support to GLORIA RICH DVORAK:

The Court hereby DENIES the Motion.

All costs of Court expended or incurred in this cause are hereby adjudged against GLORIA RICH DVORAK except that portion of the attorney ad litem fees adjudged against Wesley rich as awarded above, which are adjudged against WESLEY RICH. All writs and processes for the

enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this 30th day of April, 1985.

/s/
WHAYLAND W. KILGORE
JUDGE PRESIDING IN THE 135TH
JUDICIAL DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7202
Summary Calendar.

D.C. Docket No. CA V 89 18

IN THE MATTER OF: GLORIA JEAN R. DVORAK, ET AL,

Debtors.

GLORIA JEAN R. DVORAK,

Appellant,

versus

BARBARA H. FRITZ,

Appellee.

Appeal from the United District Court for the Southern District of Texas

Before REAVLEY, JONES and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

April 29, 1993

ISSUED AS MANDATE: May 21, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7202
Summary Calendar.

IN THE MATTER OF: GLORIA JEAN R. DVORAK, ET AL,

Debtors.

GLORIA JEAN R. DVORAK,

Appellant,

versus

BARBARA H. FRITZ,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(CA V 89-18)

Before REAVLEY, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[1]

Gloria Jean Dvorak appeals the district court's affirmation of the bankruptcy court's determination that attorney's fees incurred by her ex-husband during the custody battle over their daughter, which she was then ordered to pay by the custodial court, are a non-dischargeable debt under Chapter 7 of the Bankruptcy Code.

This case involves the same parties and raises the same legal issue recently addressed by this court in *In re Dvorak*, No. 92-7203, slip op. at 3007 (5th Cir. Mar. 26, 1993), with which this case

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

should have been consolidated prior to appellate disposition. The *In re Dvorak* court held, and we are bound to follow, that Ms. Dvorak's "court-ordered obligation to pay fees charged by [her ex-husband's attorney] Barbara Fritz and a portion of fees charged by Roland Carlson as guardian ad litem.....is non-dischargeable." *Id.* at 3008.

AFFIRMED